STATE OF MICHIGAN
IN THE SUPREME COURT
On Appeal from the Court of Appeals

MARCIA SNIECINSKI,
Plaintiff-Appellee,

v.

BLUE CROSS AND BLUE SHIELD OF MICHIGAN,
Defendant-Appellant.

Supreme Court Docket No. 119407
Court of Appeals No. 212788 C
Wayne Circuit No. 96-616254-CZ

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BRIEF OF AMICUS CURIAE MICHIGAN MANUFACTURERS ASSOCIATION

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STATEMENT OF QUESTIONS INVOLVED

1. Whether this Court should reverse the decision below where the Court of Appeals clearly erred in affirming an award of economic damages when the Plaintiff-Appellee admitted that she resigned from alternate employment, did not attempt to locate other employment, and claimed to be pursuing a college degree because she had enrolled in one class per semester?

   Defendant-Appellant answered: "Yes."

   This *Amicus* answers: "Yes."

   Plaintiff-Appellee answered: "No."

2. Whether this Court should reverse the decision below where the Court of Appeals clearly erred in affirming an award of emotional damages without requiring Plaintiff-Appellee to present specific evidence of emotional injury or loss?

   Defendant-Appellant answered: "Yes."

   This *Amicus* answers: "Yes."

   Plaintiff-Appellee answered: "No."

STATEMENT OF INTEREST

The Michigan Manufacturers Association ("MMA") is a business association composed of more than four thousand (4,000) private Michigan businesses, organized and existing: (1) to study matters of general interest to its members; (2) to promote their interests as well as those of all Michigan businesses and the general public, in the proper administration of pertinent laws; and (3) to otherwise promote the general business and economic welfare of the State of Michigan. An important aspect of the MMA's activities is representing the interests of its member-companies in matters of paramount importance before the courts, the United States Congress, the Michigan Legislature, and state agencies. The MMA appears before this Court as a representative of private business concerns employing over 90% of the industrial work force in Michigan – over one million employees – many of whom are affected by the issues in the case presently before the Court on application for leave to appeal. The MMA represents the interests of its members through various means, including appearances as *amicus curiae*.

The MMA seeks to assist the Court by highlighting the impact of this case beyond the immediate concerns of the parties. Because of its experience in these matters, the MMA is well situated to brief the Court on the concerns of the manufacturing industry and the significance of this case to that industry and the jurisprudence of the State of Michigan.

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

MMA incorporates Defendant-Appellant's "Statement of Material Proceedings Below" and "Statement of Material Facts" as if set forth in full in this brief.

The paramount issue in this case – the determination of damages under the Elliott-Larsen Civil Rights Act ("CRA") – is of particular concern to the MMA and its members. As a principal voice of the manufacturing industry in the State of Michigan, the MMA has a strong interest in ensuring that the body of state law under which the industry functions remains

predictable and that court decisions interpreting that law reflect sound legal reasoning. Your *amicus* submits that the decision below, although not officially published, addresses issues that impact employers throughout the State of Michigan. By affirming an award of "emotional" damages even though the plaintiff never produced specific proof of emotional injury or loss, the Court of Appeals' decision contradicts the CRA's statutory requirement that damages be appropriate for the claim at issue and compensate actual injury or loss caused by a violation of the CRA. By affirming an award of economic damages even though the plaintiff voluntarily resigned from alternative employment and subsequently never sought additional employment, the Court of Appeals' decision also contradicts established case law which requires the plaintiff to mitigate damages by seeking alternative employment.

ARGUMENT

At the critical stage of determining damages, especially emotional damages, the law provides little objective instruction for juries, courts, and legal counselors. This case presents the Court with the opportunity to provide much-needed guidance on two important aspects of damages: the standard for recovery of emotional damages under the Elliott-Larsen Civil Rights Act ("CRA"), MCL § 37.2202 *et seq*; MSA § 3.548(101) *et seq*, and the duty to mitigate under the CRA.

I. THE STATUTE DOES NOT SUPPORT AN AWARD OF EMOTIONAL DAMAGES IN A FAILURE TO HIRE CASE.

There is no legislative provision in the CRA for "emotional damages." The statute provides only that:

> A person alleging a violation of this act may bring a civil action for *appropriate* injunctive relief or damages, or both.
> MCL § 37.2801(a); MSA § 3.548(801)(1)(emphasis added).
>
> As used in subjection (1), "damages" means damages for *injury or loss* caused by each violation of this act, including reasonable

attorneys' fees.
MCL § 37.2801; MSA § 3.548(801)(emphasis added).

In contrast, the legislature has explicitly addressed emotional damages in other statutes. *See* MSA § 19.418(105)(a); MCL § 445.1715 (Personal Privacy Protection Act); MSA § 27A.2917(1), MCL § 600.2917(1)(liability for conduct involving larceny of goods); MSA § 27A.2945(f), MCL § 600.2945(f)(defining damages in product liability action); MSA § 27A.5511(2), MCL § 600.551(2) (defining when a prisoner can recover damages for mental or emotional injury).

This Honorable Court has not expressly addressed the question of whether the CRA provides for emotional damages, although it has concluded that "exemplary" damages – damages for mental distress and suffering arising from an intentional or malicious act – are not permitted. *Eide v Kelsey-Hayes Co*, 431 Mich 26, 36; 427 NW2d 488, 492 (1988)(citations omitted). Examining the language of the CRA, Justice Griffin noted in *Eide* that "there is no express provision in the CRA for exemplary damages" and that "its legislative history reveals no basis for inferring a legislative intent to provide such an unusual remedy." *Id* at 55; 427 NW2d at 500 (concurring). While the Court observed that "the Court of Appeals . . . [has] consistently extended the remedies provided under the CRA to damages for humiliation, embarrassment, and outrage," the question of whether those types of damages were proper was not presented for review. *See id* at 35; 427 NW2d at 492.[1]

The statute is the source for determining whether the CRA provides for emotional damages. The CRA speaks of "*appropriate* injunctive relief or damages," i.e., relief tailored to

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[1] The Court of Appeals has assumed, without conducting statutory analysis, that emotional damages are recoverable under the CRA without regard to the nature of the violation alleged. *See Hyde v Univ of Michigan Bd of Regents*, 136 Mich 301; 356 NW2d 626 (1984); *Jenkins v Southeastern Chapter of American Red Cross*, 141 Mich App 785; 369 NW2d 223 (1985); *Schafke v Chrysler Corp*, 147 Mich App 751; 282 NW2d 141 (1985).

the circumstances of the particular case. *See* MCL § 37.2801(1); MSA § 3.548(801)(1) (emphasis added). In a case such as this, which alleges failure to hire, damages traditionally resemble awards for breach of an employment contract: 1) back pay; 2) front pay; and 3) any other economic damages arising from the failure to hire. *See Schafke v Chrysler Corp*, 147 Mich App 751; 383 NW2d 141 (1985)(back pay); *Stearns v Lakeshore & MS Ry Co*, 112 Mich 651, 654-655; 71 NW 148 (1897)(front pay); *Reithmiller v Blue Cross & Blue Shield of Michigan*, 151 Mich App 188, 201; 390 NW2d 227 (1986)(front pay).[2] Even though breach of an employment contract is "inherently fraught with distress," contract law traditionally does not provide damages for mental and emotional suffering. *Isagholian v Carnegie Institute of Detroit, Inc*, 51 Mich App 220; 214 NW2d 864 (1974); *Stopczynski v Ford Motor Co*, 200 Mich App 190, 197; 503 NW2d 912, 915 (1993). Similarly, there is no recovery in contract for injury to the employee's reputation. *Kocenda v Archdiocese of Detroit*, 204 Mich App 659, 665; 516 NW2d 132, 134-35 (1994). This is true even if the plaintiff alleges that the defendant acted maliciously or willfully. *See Franzel v Kerr Mfg Co*, 234 Mich App 600, 606; 600 NW2d 66, 70 (1999).

In this case, the harm flowing from the alleged failure to hire can be objectively measured through an award of back pay and front pay in the same manner that the court measures damages in a breach of contract case. There is simply no need to resort to damages traditionally available only under tort-like claims, such as emotional and/or mental distress damages. Accordingly, there is no statutory support for allowing damages in a failure to hire case to deviate from damages available for breach of an employment contract.

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[2] Other concepts of contract law also appear in failure-to-hire cases, such as the duty to mitigate damages, *Rasheed v Chrysler Corp*, 445 Mich 09, 127 n 25; 517 NW2d 19, 24 n 25 (1994), and the right to a jury trial. *See Smith v Univ of Detroit*, 145 Mich App 468; 378 NW2d 511 (1985).

II. IN THE ALTERNATIVE, THE STATUTE REQUIRES PLAINTIFF TO PROVE EMOTIONAL INJURY OR LOSS TO RECOVER EMOTIONAL DAMAGES, AND SHE FAILED TO DO SO.

Assuming *arguendo* that the CRA allowed for emotional damages in a failure to hire case, the plaintiff here failed to present sufficient evidence to justify any award of emotional damages. The CRA does not provide for damages as a matter of course simply because the jury finds discrimination; instead, damages must be for "injury or loss caused by each violation of this act[.]" *See* MSA § 3.548(801); MCL § 37.2801.

The record below lacks the specific evidence of emotional injury or loss necessary to support a finding of injury. The plaintiff presented no medical or physical evidence demonstrating emotional injury. She produced no testimony about adverse changes in her behavior, appearance, or mental health. Indeed, the only testimony in the record is plaintiff's testimony that she felt "very upset" when she learned that she was no longer eligible for the job that she had sought and that she found it "very humiliating" to discuss her situation with her co-workers. This emotion is not linked to any physical, mental, or emotional manifestation of injury. Quite the opposite: the plaintiff acknowledged that her personal life was "fine," that her co-workers had not harassed her, and that her relationship with other employees in her department was good. Since the plaintiff has not shown actual injury or loss caused by a violation of the act required under the CRA, the record does not support an award of emotional damages.

The statute's requirement of *actual* injury or loss is in accord with Michigan's general law on recovery of emotional damages, which provides that a plaintiff cannot recover for mental anguish unless she shows "specific and definite evidence of . . . mental anguish, anxiety or distress." *Wiskotoni v Michigan Nat'l Bank*, 716 F2d 378, 389 (CA 6 1983)(applying Michigan law under *Vachon v Todorovich*, 356 Mich 182, 188; 97 NW2d 122 (1959)); *see also,*

Washington v Jones, 386 Mich 466; 192 NW2d 234 (1971)(striking jury award for loss of consortium where record contained no specific evidence of impact that plaintiff's injury had on the marital relationship); *Daley v La Croix*, 384 Mich 4, 15; 179 NW2d 390 (1970)(vague testimony from lay witness that plaintiff was "nervous" was insufficient to support award of damages for emotional injury).

III. PLAINTIFF FAILED TO MITIGATE HER ECONOMIC DAMAGES.

Michigan requires the plaintiff to make every reasonable effort to minimize her damages. *See Klanseck v Anderson Sales & Services, Inc*, 426 Mich 78, 90-91; 393 NW2d 356 (1986). If the employer shows that the plaintiff "failed to make an honest, good faith effort to secure employment," her damages will be cut off for failure to mitigate. *Dep't of Civil Rights v Horizon Tube Fabricating, Inc*, 148 Mich App 633; 385 NW2d 685 (1986); *Rasheed v Chrysler Corp*, 445 Mich 109, 123-124; 517 NW2d 19 (1994); *Morris v Clawson Tank Co*, 459 Mich 256, 263 (1998).

A. Plaintiff's efforts to secure work during the period from May 1994 until December 1994 were inadequate.

Here, the record shows that the plaintiff failed to make reasonable efforts to mitigate her economic damages during the period from May 24, 1994, when she was released from maternity leave (and claimed that the defendant employer should have hired her), through December of 1994, when she accepted a position with her previous employer. When she learned that the defendant was no longer hiring, she collected unemployment benefits for seven months and did nothing more than a token search for work to satisfy the requirements for obtaining unemployment benefits. Specifically, she contacted four companies, "went through the yellow pages," and contacted her previous employer, although she did not apply for any positions. In

December of 1994, her previous employer contacted her and offered her a position as a marketing representative, which she accepted.

The defendant argued in a motion for remittitur (which was denied) and on appeal (without avail) that the trial court has the authority to rule that, as a matter of law, the plaintiff's efforts at obtaining alternate employment were inadequate and amounted to a failure to mitigate. In the absence of instruction from this Court indicating that the trial court has such authority, the courts below expressed reluctance to question the damage amount awarded by the jury, relying upon *Morris v Clawson Tank Co*, 459 Mich at 264-66, which notes that the adequacy of the plaintiff's efforts at mitigation is usually a question for the fact-finder. This Court should clarify that Morris did not disturb the general rule that the trial court can rule on the matter when the evidence is such that no reasonable juror could find in favor of the plaintiff. *See generally Barrett v Kirtland Community College*, 245 Mich App 306, 311, 312; 628 NW2d 63 (2001) (judgment for defendant is appropriate notwithstanding the verdict if no reasonable juror could have found for plaintiff); *see also EEOC v Serv News Co*, 898 F2d 958, 963 (CA 4 1990)(as a matter of law, a cursory search of want ads is insufficient mitigation); *accord, Booker v Taylor Milk Co, Inc*, 64 F3d 860, 865 (CA 3 1995).

B. Plaintiff is not entitled to damages after she voluntarily chose not to continue available, alternate employment in September of 1996.

In September of 1996, the plaintiff voluntarily quit the job she had taken in 1994 after reading that the defendant had a job posting for the same type of job (account representative) that she believed she should have received in May of 1994. Because she voluntarily abandoned alternate employment and made no effort to obtain other work, her economic damages should be

cut off as of September of 1996.[3] Where the record establishes that a plaintiff made no attempt to seek alternate employment, a defendant need not show more in order to prove that the plaintiff failed to mitigate. *See Quint v A E Staley Mfg Co*, 172 F3d 1, 16 (CA 1 1999); *Greenway v Buffalo Hilton Hotel*, 143 F3d 47, 54 (CA 2 1998); *Brady v Thurston Motor Lines, Inc*, 753 F2d 1269, 1278 (CA 4 1985); *Sellers v Delgado College*, 902 F2d 1189, 1193 (CA 5 1990); *EEOC v Delight Wholesale Co*, 973 F2d 664, 670 (CA 8 1992); *Weaver v Casa Gallardo, Inc*, 922 F2d 1515, 1527 (CA 11 1991). This Court should hold that a plaintiff's failure to seek any alternate employment constitutes failure to mitigate damages as a matter of law.

C. Plaintiff is not entitled to damages for the period 1996 through 2000 in which she made no attempt to find other work and, instead, attended two classes.

Economic damages are also improper after September of 1996 because the plaintiff admitted that after she resigned alternate employment in September of 1996, she chose not to search for other employment of any type. Instead of searching for work, the plaintiff testified that she decided to pursue a college degree and sought damages for the four year period from 1996 through 2000 in which she was allegedly studying.

Michigan appellate courts have not previously addressed whether a decision to attend school, without first seeking employment, is a reasonable attempt to mitigate damages. Courts that have addressed this issue have held that a plaintiff cannot recover economic damages for the period of time when she chose to attend school, since "when an employee opts to attend school, curtailing present earning capacity in order to reap greater future earnings, a backpay award for the period while attending school . . . would be like receiving a double benefit." *Taylor v Safeway Stores, Inc*, 524 F2d 263, 268 (CA 10 1975); *accord, Floca v Homcare Healthcare*

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[3] The plaintiff did not claim that she was constructively discharged in 1996, and the Court of Appeals held below that her voluntary resignation did not constitute constructive discharge.

Health Servs, Inc, 845 F2d 108, 113 (CA 5 1988)("The time a person spends in school learning a new career is an investment for which future benefits are expected. The student is compensated for the time in school by the opportunity for future earnings in the new career and thus suffers no damages during that period."); *accord, Miller v Marsh*, 766 F2d 490, 492 (CA 11 1985); *Washington v The Kroger Co*, 671 F2d 1072, 1079 (CA 8 1982).

Ignoring these cases, the Court of Appeals held that the plaintiff's decision to pursue a degree was a reasonable attempt to mitigate damages, citing dissimilar cases: *Smith v American Serv Co*, 796 F2d 1430 (CA 11 1996), *Hanna v American Motors Corp*, 724 F2d 1300 (CA 7 1984), and *Brady v Thurston Motor Lines, Inc*, 753 F2d 1269 (CA 4 1985). In those cases, the plaintiffs diligently searched for alternative employment but were unable to find work. The plaintiff in *Smith* "had been actively searching for work with little success" before entering school full-time and then worked part-time while a student. 796 F2d at 1432. The plaintiff in *Hanna* visited the unemployment office and potential employers and completed job applications after termination and throughout his full-time college career and held a seasonable job. 724 F2d at 1303. The relevant plaintiff in *Brady* searched for a job before entering college full-time and continued to search for work thereafter, working at seasonal and part-time work while a student. 753 F2d at 1271. In this case, the only job "search" that the plaintiff ever conducted was done in 1994, when she made cursory contact with four companies, "reviewed" the yellow pages, and telephoned her previous employer, without completing a job application. These minimal efforts, made two years before quitting her alternate employment (and four years before trial), simply cannot satisfy her duty to mitigate.

There is yet another critical distinction between this case and the cases cited by the Court of Appeals: unlike those plaintiffs, who enrolled in full-time study in specific career or degree programs, the plaintiff here only purported to be pursuing a college degree. She enrolled in just

one class per semester ("Sign Language I" in the spring semester of 1997 and "Sign Language II" in the spring semester of 1998), and there is no evidence that she was enrolled in a degree program of any type or that the classes she took were part of the required curriculum for attaining a particular degree.[4] She remained unemployed from September 1996 through the time of trial in March 1998. Forfeiting employment to enroll in these classes is a patent failure to mitigate. *See Miller v Marsh*, 766 F2d at 492.

IV. PLAINTIFF FAILED TO MITIGATE HER ALLEGED EMOTIONAL DAMAGES.

Assuming *arguendo* that the CRA allows recovery of emotional damages in a failure to hire case such as this, and assuming *arguendo* that the plaintiff's bare testimony was sufficient evidence to support an award of emotional damages, she failed to make any effort to mitigate those damages.

A plaintiff's duty to mitigate includes seeking treatment for injuries which she allegedly suffers. *See Klanseck*, 496 Mich at 90-91 (defendant entitled to jury instruction on plaintiff's duty to mitigate where plaintiff failed to pursue diagnosis and possible medical treatment for his alleged injuries). Although plaintiff here testified that she felt humiliated, she did absolutely nothing to mitigate her alleged emotional injury. She did not seek therapy or psychological treatment. She did not take any medication. She presented no evidence that she sought counseling or enrolled in a self-help program. In short, if she did suffer emotional injury, she did absolutely nothing to minimize that injury. "It is well-settled that an injured party has a duty to exercise reasonable care to minimize damages, including obtaining proper medical . . . treatment." *Klanseck*, 426 Mich at 90-91 (citing *Poikanen v Thomas Furnace Co*, 226 Mich 614, 618-619; 198 NW 252 (1924)); *Smith v Jones*, 382 Mich 176, 186; 169 NW2d 308 (1969); *see*

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[4] Plaintiff also took a private recreational martial arts class. There is no suggestion in the record that this class provided college credit or was related to any college degree program.

also comments to Michigan Model Civil Jury Instruction 53.05 (cases holding that the duty to minimize damages include a duty to seek and follow medical treatment). Accordingly, the plaintiff's emotional damages are improper since she failed to even attempt to mitigate any alleged emotional injury.

CONCLUSION AND RELIEF REQUESTED

For all the reasons set forth above and for the reasons set forth in appellant Blue Cross Blue Shield of Michigan's Brief on the Merits, your *amicus curiae*, the Michigan Manufacturers Association, requests that this Honorable Court reverse the decision of the Court of Appeals below and vacate the emotional and front pay damages awarded at trial.

Respectfully submitted,

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Date: November 8, 2002

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PROOF OF SERVICE

Pursuant to MCR 2.107, the undersigned certifies that two copies of the Michigan Manufacturers Association's Notice of Hearing, Motions for Immediate Consideration and for Leave to File Brief *Amicus Curiae*, along with the Brief *Amicus Curiae* and this Proof of Service were served upon each of the following via Federal Express on November 8, 2002:

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I DECLARE UNDER THE PENALTY OF PERJURY THAT THE ABOVE STATEMENTS ARE TRUE TO THE BEST OF MY KNOWLEDGE, INFORMATION AND BELIEF.

Lira A. Johnson

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SUPREME COURT

STATE OF MICHIGAN

IN THE SUPREME COURT

DEC [illegible] 2002

TERM

Appeal from the Court of Appeals
Hilda R. Gage, Kathleen Jansen, and Peter D. O'Connell, JJ.

THE PEOPLE OF THE
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Plaintiff-Appellee,

-v-

Docket No. 120515

TERRY LYNN KATT,

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_____/

BRIEF ON APPEAL – PLAINTIFF-APPELLEE

ORAL ARGUMENT REQUESTED

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